COMMITTEE ON RULES OF PROCEDURE
IN DOMESTIC RELATIONS CASES

Monday, March 15, 2004 10:00 am – 3:00 pm
Arizona Courts Building
1501 W. Washington, Conference Room 345
Teleconference #: (602) 542-9006
Web Site: http://www.supreme.state.az.us/drrc/

Members Present:
Hon. Mark Armstrong, Chair
Annette T. Burns, Esq.
Hon. Norm Davis
Bridget Humphrey, Esq.
Hon. Michael Jeanes
Phil Knox, Esq.
Janet Metcalf, Esq.
Hon. John Nelson
Hon. Dale Nielson
Richard Scholz
Robert Schwartz, Esq.
Debra Tanner, Esq.
Hon. Nanette Warner
Brian Yee, Ph.D.

Members Not Present:
Annette Everlove, Esq.
Deborah Fine, Esq.

Staff Present:
Konnie K. Young, Esq.
Karen Kretschman, Esq.
Elizabeth Portillo

Member Represented by Proxy:
Steve Wolfson, Esq. for
Robert Schwartz, Esq.

Quorum:
Yes

1. Call to Order: Hon. Mark Armstrong

After welcoming Committee members, Judge Armstrong reviewed the new materials: Administrative Order; Meeting Schedule; Composition of workgroups 4-6; Minutes; Rules Outline; Draft of Rules that are already done; Workgroup materials; Applicability of Rules of Evidence. Judge Armstrong noted that the Attorney General's office had some suggestions on Rule 2(b)(3). Judge Armstrong thought they were good suggestions, and that the only thing lacking is the provision about strict compliance upon reasonable notice, which needs to be added. Discussion ensued. The decision was made to come back to it after Konnie and Judge Armstrong had a chance to work on it.

There was a motion to approve the minutes.

Motion: Minutes Approved.
Seconded
Vote: Minutes Approved.

2. Reports from First Workgroups: Sections I, II, III

a. Workgroup 1 – Outline Sections I and II (Bridget Humphrey, Chair)

Limited Scope Representation

Bridget stated that Pat Gerrich, at Community Legal Services and the Volunteer Lawyer's Program (VLP), requested a State Bar ethics opinion on limited scope representation, and heard from one member of the State Bar Ethics Committee. Bridget did not know if the person wished to have this made public, and she could not reach him on Friday. She said the gist of it approves limited scope and pulls in the old ethics opinion from 1993 or 1991, which states that an attorney who provides ongoing assistance to a *pro per* should disclose it to the court.

TASK: Bridget will present the ethics opinion(s) on limited scope representation at the next meeting.

b. Workgroup 2: Outline Section XI (Judge Davis, Chair)

Judge Davis stated that he believes his workgroup is finished, and they just need to do a final review at the end to make sure everything fits together.

c. Workgroup 3: Outline Section III. (Annette Burns, Chair)

Default

Annette stated that her workgroup worked on default consent decrees and had provided a report which was included in the new materials today. What used to be Rule 55 on defaults is now Rule 48. She reviewed it and made changes per the discussion at the last meeting. The workgroup changed anything that said "damages" to "relief sought by petitioner."

The categories for default by motion were broadened (Rule 55 (b)(1) subsection (2)). The only two requirements for a default by motion now are: 1) there are no minor children of this relationship born before, during this marriage or adopted and wife is not pregnant; and 2) the parties waive any right to spousal maintenance.

Rule 55(b)(2)

There was discussion regarding Rule 55(b)(2). The changes made were: 1) deleted "amount of" before "relief" in the third from last paragraph, 2) deleted the last sentence of the third from last paragraph, and 3) combined the last two paragraphs to read as follows: "Once a defaulted respondent has made a motion under the provisions of Rule 55(c), after entry of default but before judgment of default, the trial court shall allow respondent to participate in the hearing to determine what, if any, is appropriate relief to be awarded petitioner pursuant to the petition, or to establish the truth of any averment." There was more discussion, and the outcome was that the members would need to think more about it before making any other changes.

Rule 54

Rule 54 is now Rule 49. At the last meeting it was requested that there be a form for Consent Decree. Annette had attached a form to her material, but told the group that there would no doubt need to be changes made to it. She stated that it incorporates the stipulation for Entry of Consent Decrees. The statement that the Committee agreed upon that should stay in the form is that it has to be signed by a party in order to get a Consent Decree. This is a decree that is entered without any appearance by the parties. It also includes that the parties are agreeing to the following: 1) they do not have a covenant marriage, 2) they are waiving their right to trial, 3) there is no duress or coercion, 4) they understand that they could have had legal advice and a trial had they not settled, 5) the marriage is irretrievably broken, and 6) the property division is fair and equitable. Both parties have to sign and have their signatures notarized, and the attorneys have to approve, if there are attorneys; the AG has to approve the child support amount, if the AG is assigned to the case.

Also, if there are children, the form should include any findings about the parent information program (whether parents attended the class), that custody is in the best interests of the children, and any other relevant matters to child custody and support.

Discussion ensued regarding the form. The decision was made to move the findings on page 12 in Exhibit A to the end of the decree itself (page 7), and to delete the "Physical Custody Adjustment" portion (J) on page 3.

Rules of Evidence

At this point, Judge Armstrong said that the four versions of the Rules of Evidence were now projected on the screen and included the following:

1. Language borrowed from the Attorney General's suggestion.
2. Strict Compliance with the Existing Rules of Evidence
3. 803(6) with the Attorney General's suggestion of amending 3(2) - this is simplified and does not require testimony.
4. Some rough language that the Committee came up with as an alternative referring to Rule 35.

It was suggested that it should start with the phrase that "The *Arizona Rules of Evidence* apply unless otherwise stated herein." Judge Armstrong thought that this added an element of confusion. Discussion ensued. It was suggested that there be a time limit added. Judge Armstrong asked that those who wanted to add a time limit write something up for him and if it made sense the Committee would discuss it. He thought this issue had already been decided and did not want to spend a lot of time on it at this meeting. There was more discussion regarding a rebuttal provision plus the provision about invoking the rules, and Judge Armstrong stated that there is too much confusion when the provision about invoking the strict compliance is combined with the Rules and the rebuttal presumption. He suggested that we go back to the original paragraph two. There would still be the change in paragraph three dealing with testimony and evidence.

LUNCH

3. Reports from Second Workgroups: Sections IV, V, and VI

a. Workgroup 4: Outline Section IV (Judge Davis, Chair)

<u>Emergency Temporary Orders</u>

Judge Davis discussed Emergency Temporary Orders. He said his workgroup was thinking of adopting a form similar to Pima County's form on spousal maintenance; it is short and to the point. He mentioned last month's discussion regarding having the primary goal temporary orders and then having expedited hearings, whether they are called expedited or emergency hearings, but all of that needs to be blended in together. It was asked whether the purpose of the second paragraph under Emergency and Temporary Orders was to prevent spousal maintenance issues. Judge Davis said they had not talked about that, but the answer is "Not necessarily." He said they need to rework it. He stated that spousal maintenance would be more likely to follow within an expedited hearing – a temporary order within a normal course or an expedited hearing.

Judge Armstrong stated that Judge Davis would like the opinion of the Committee as to whether to have a detailed standard versus a Rule 65 standard. One of the members suggested that there be a fifth "catchall" due to the fact that there were circumstances that would not fit under any of the other four categories. He had just recently had a circumstance that did not fit under any of the four categories. Judge Davis asked if that circumstance would be covered under "immediate and irreparable harm," and the member agreed that it would need to be something that would fit because if "emergency" is only defined in one of the four ways, then it would not work in this case. Judge Davis said that he was in favor of going back to the "immediate and irreparable harm" general standard.

Judge Davis asked the members if we limit it to children who are threatened, whatever the standard is, and waste of financial resources, would those be all the emergencies we see. Discussion ensued regarding emergency *ex parte* orders. Steve Wolfson stated that he had done an emergency hearing as a judge *pro tem*; however, it was not an *ex parte* hearing. Judge Davis thought that perhaps there should be an Emergency *Ex parte* Order that is an emergency and no one is there, and an Expedited Temporary Order. Steve mentioned that (a) does give the latitude to the court because it says "may," and it says, "or upon the court's own motion."

Judge Davis stated that this was a work in progress, and there were a lot of issues that the Committee had not fleshed out as yet, so he was not recommending either of these versions. Judge Armstrong said that it is difficult to define "emergency" because it is so illusive. It was suggested to add the word "welfare." Judge Armstrong stated that Judge Davis was proposing just to use the "immediate and irreparable harm" standard from Rule 65 and then have a comment to flesh it out – that this needs to be a serious imminent threat. He suggested that we could use some of these as examples in the comment. It was suggested that a comment is just guidance, and if this were in a rule, it would no longer be just guidance; he asked if there was a distinction to be drawn between that. Dr. Yee stated that he thought examples were a better way to go than trying to specify, due to the fact that human beings are remarkably creative in generating new circumstances. He said that we will never be creative enough to cover every possible contingency.

Judge Davis asked if everyone agreed with following the Rule 65 standard. There was some discussion, and the decision was to use the Rule 65 standard with comments.

b. Workgroup 5: Outline Section V (Judge Nelson, Chair)

Rule 35

Janet Metcalf stated that the workgroup made a few minor corrections that were requested at the last meeting: Rule 35(a) – added in any vocational issues and cleaned up a few mistakes from the previous document. Regarding the issue of girlfriends, new husbands, etc., the workgroup could not come up with any other way other than what's already stated in the Rule. There were questions regarding how to order an exam of someone who is not a party to the case, and if they were joined, was it an involuntary joinder.

Judge Armstrong stated that as it stands now, they use a coerced "voluntary" agreement. Dr. Yee said that the Family Court is more concerned with the best interests of the child than the constitutionality of a third party's rights. Judge Armstrong said that the constitutional issue is both substantive and procedural due process. He said we can answer the procedural due process with joinder but not with the other. He also stated that he would prefer to take it out and handle it on a case-by-case basis or add something that would say something to the effect that upon agreement the court might order a third person to participate in these tasks, and if the third party fails to do so, the court may interpret some negative connotation, as when people invoke the Fifth Amendment.

Judge Davis asked if we really want to go there in regard to a presumption. Dr. Yee made the comment that if all you have to do to trigger the presumption is to make the allegation, all we will do is increase the frequency of allegations.Judge Armstrong said that he was satisfied with taking the language out and avoiding the constitutional issue. The Committee decided that this was the way to handle the situation.

Rule 36(a)

Janet said that under the Request for Admissions, the workgroup had originally restricted it to only deal with the authenticity of documents, but they had restored the language that it would include statements or opinions of facts for the application of law or fact, which was the consensus of the group.

Rule 36(b)

The workgroup had limited the Request for Admissions to ten, and at the request from the Committee, they put it back to 25. There were other changes made, but none of them were controversial.

Uniform Interrogatories

Judge Nelson stated that the group had altered those to be a little more specific. He spoke to David Weinstock, J.D., Ph.D., and asked him to provide questions that he thought were basic questions an evaluator would actually need. The workgroup incorporated those under the heading of "Child Custody" (9-17) and moved a few things around so that they would be a little more specific. Janet stated that the questions were not formatted in the same way as the other interrogatories, but if the members agreed to the questions, she would format them in the same manner.

Steve and Dr. Yee asked to add "mental health conditions" under 13(A). Janet agreed to do so. It was agreed that the language "parent's parenting skills" be added at the end of 10(B)(I), in order to limit the scope. Judge Armstrong asked Janet to rework this and send it to Konnie.

Task: Janet will rework the uniform interrogatories and send the finished product to Konnie.

Janet had a question regarding 10(A). She said she did not know if we wanted to explain more for the benefit of *pro pers* what legal custody decision making means. Dr. Yee's suggestion was to make II decision making (legal custody). Judge Armstrong said we would be eliminating child access, and, therefore, could say "decision making legal custody, parenting time arrangements" because that encompasses child access and parenting time. Janet asked if we want to explain the different types of legal custody, or leave it as is. Judge Warner said that she had written a description of all of those for Pima County's Self Service Center and would send a copy to Janet. The decision was made that Janet would add those descriptions.

Task: Janet will add descriptions of the different types of legal custody.

Rule 26.1

At this point, Judge Davis asked if the group had worked on 26.1. Janet said that Bob Schwartz had sent financial disclosure forms, but he was not present. Judge Armstrong asked Steve if he was ready to discuss Bob's work. Steve suggested that perhaps the Committee should wait until next meeting to discuss the forms, as Bob will be at this meeting, and it will also give the members time to look over the forms.

Judge Davis feels this is a big area, and the court will get mountains of material, and that there are five issues. He would like to go to a three-tiered system:

1. If there is no response filed, there is no disclosure required.
2. If there is a response filed, then a simplified disclosure is required that has the court documents for all of the five issues that we use most of the time in most of the cases, such as child support, tax returns, pay stubs, and proof of daycare.
3. If this is a bigger case, more detailed disclosure is required.

After this, the court ties everything it does in Temporary Orders hearings and trial preparation to all of that, so that this is the basic minimum disclosure requirements required in every case. That way the court does not get bogged down with people writing 30 pages of what their factual basis is, why they should get custody, etc. He feels we need to simplify this rule because it is so wordy and so convoluted when applied to the Family Court context. He also suggests that they have a position statement saying what their position is on each of the five issues.

Judge Armstrong asked who determines and at what point you are in the second or third tier. Judge Davis said when the response is filed, that triggers the simplified disclosure. If either side decides they have a big case, they then file a request for more detailed disclosure. Judge Armstrong asked the members what they think of Judge Davis' suggestion. The consensus of the Committee was to include it. Judge Armstrong asked Judge Nelson to speak to Bob regarding this suggestion, as Bob will be handling this area by himself. Judge Nelson said he would be happy to give the members a draft. Judge Armstrong said that this would be helpful.

Task: Judge Nelson will draw up a draft of Rule 26.1 including the members' suggestions.

c. Workgroup 6: Outline Section VI (Judge Warner, Chair)

ADR Settlement

Judge Warner's workgroup has met three times telephonically. The group has come up with a number of ADR tools that would be available to the parties and the court depending upon the situation.

Judge Davis had drafted a memo regarding an "initial case management conference" he has been doing in his court, along with a position statement that he uses. The idea is to get everyone together in the case as soon as practical to distill all the issues possible, to see if a case can be wrapped up that day and possibly even a decree entered. If not, some temporary orders (where needed) can be made, and a trial date can be set.

Judge Warner stated that the other rule they had looked at was a redraft of Maricopa's Local Rule 6.10, and the group liked a lot of what it had to add. They are looking at bringing that into the rules.

Another draft that had been handed out to the members was regarding petitions for conciliation. Judge Warner said that in looking at the local rules, they mix up conciliation with mediation, and the workgroup found it confusing. This is an attempt to establish a rule for filing of a petition for conciliation for the purpose of trying to preserve the marriage. In Pima and Maricopa Counties, this is filed as a minute entry. However, in all of the other counties it is filed directly in whatever they call their Family Court file. Judge Warner's rule says it should be filed either in the dissolution file or in a separate file with a minute entry in the Petition for Dissolution file. They have also added that there can be no more than one stay in a 12-month period because some people use Petitions for Conciliation to delay the entry of divorce. The people are required to go to all the appointments, which will be confidential.

Judge Armstrong asked a question regarding B (the limitation of one stay during 12 months) and F (indicates that upon mutual agreement they can extend it). Judge Warner stated that this would mean that the stay is in effect; parties will agree that they will stay in conciliation to try to work things out in order that a case can stay past the 60-day period. What B says is that the court cannot kick it out from conciliation and kick it back, and then the spouse goes in again and files another petition for conciliation to have it stayed again. The question was raised as to whether or not to add that this is subject to the agreement of the parties, or to clarify any confusion between B and F. Judge Warner said she would add this statement to B.

Judge Warner stated that they will also be working on a rule on private ADR with mediation and arbitration. They do not yet have a draft of that.

Rule 16

Judge Armstrong asked Judge Davis to give the group five minutes in regard to his proposal. Judge Davis stated that this was a redraft of Rule 16 – Pretrial Conference. They are calling it an "Initial Case Management Conference." When parties ask for an initial case management conference or the court—based on the facts of the case—determines to set one, the parties can do one of three things:

1) Meet and confer in an attempt to resolve as many issues as they can before they come to the court (unless there are issues of domestic violence or an Order of Protection that prohibits it), and take the steps toward resolving the issues;
2) Comply with Rule 16.1 disclosure, or
3) Prepare a position statement to set the parameters and use a form that Judge Davis has used with success in the past.

The Position Statement would list all the things that could happen. In paragraphs B, C and D, the court can determine the positions, enter Temporary Orders as agreed, or enter Temporary Orders within the parameters of the position if there are narrow differences.

Judge Davis stated that the second rule had not been drafted as of this time.

"Pretrial Orders" picks up from 16 (e). "Sanctions" is 16(f) to make sense with Family Law. The last one is Rule 80(d), which is identical except an 80(d) agreement would not have to be entered into the minutes.

At this point, Judge Nielson mentioned that these issues regarding time and access to the court come up a lot on the Domestic Relations Committee, and that there people who come to this committee and share their concerns about the wife filing a petition and then the husband does not get to see their child for three or four months waiting for a Temporary Orders hearing. Time is a significant issue. Some of their complaints seem to be valid. Judge Nielson just wanted to remind the Committee that time is very significant in many child custody issues early on. He would like there to be some way that we can involve the court earlier in a child custody issue.

Judge Armstrong said that this issue would be part of Temporary Orders, and that he believes that the consensus of the Committee is that they do want to have some time frames for that very reason. He also stated that it is hard to have a time frame as to when the trial will be, but when someone makes a request for Temporary Orders, it seems as though they should be brought in for some meaningful hearing within a reasonable period of time. He suggested that those who are working on Temporary Orders consider this.

Judge Nielson said that in the smaller counties, criminal and dependency gets priority, and domestic relations get pushed to the back many times. He feels that if there were a rule that made them give it attention early, perhaps they could juggle things better. There was discussion regarding a time frame, and Judge Armstrong asked Judge Davis to add to the Temporary Orders rule that whatever would be set upon the Request for Temporary Orders needed to be held within 60 days.

Task: Judge Davis will add to the Temporary Orders rule that any hearings set upon the Request for Temporary Orders need to be held within 60 days.

4. Next Meeting: Judge Armstrong

The next meeting will be held on April 28, 2004, 10:00 am – 3:00 pm, Arizona Courts Building, 1501 W. Washington, Conference Room 345. The conference call number is 602.542.9006.

5. Call to the Public

There were no public members in attendance.

6. Adjournment: Judge Armstrong

Judge Armstrong adjourned the meeting at 3:00 pm.